Pembinaan Lian Keong Sdn Bhd v Yip Fook Thai (practising as Messrs Yip & Co)

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–1503 OF 2003
VINCENT NG J
27 JANUARY 2005

Civil Procedure — Injunction — Injunction to restrain party from presenting winding up petition against company — Whether debt due from client to lawyer after one year from delivery of gross bill of costs — Legal Profession Act 1976 ss 124 & 128

Companies and Corporations — Winding up — Inability to pay debt — Legal fees — Bill delivered but not taxed — Whether bill of costs became debt due and payable after one year — Whether s 218 notice an abuse of process of court and tactical ploy to bring unwarranted pressure on company — Legal Profession Act 1976 ss 124 & 128

Companies and Corporations — Winding up — Injunction to restrain petition — Inability to pay legal fees — Bill delivered but not taxed — Whether bill became debt due and payable after one year — Whether s 218 notice an abuse of process of court and tactical ploy to bring unwarranted pressure on company — Legal Profession Act 1976 ss 124 & 128

Legal Profession — Remuneration — Bill of costs — Bill delivered but not taxed — Whether bill became debt due and payable after one year — Whether should have sued for legal fees through common law courts — Legal Profession Act 1976 ss 124 & 128

The plaintiff had engaged the defendant's legal services to commence a winding up petition against a third party which was subsequently struck out. It was only after two years of the striking out of that winding up petition that the defendant issued a gross bill (vis-a-vis a detailed bill) for RM11,425.51. The defendant alleged that he had demanded payment of the sum but the plaintiff had failed to respond. The defendant threatened to wind up the plaintiff company. The plaintiff applied for an interim injunction to prevent the defendant from presenting a winding up petition until the disposal of the declaratory reliefs sought by the plaintiff being, inter alia, that the defendant's bill amounting to RM11,425.51 was excessive, unreasonable and invalid, and that the defendant was not entitled to the said amount which was disputed. In answer, the plaintiff stated that though it had disputed the bill, the defendant had not advised the plaintiff to apply for taxation of the bill but had deliberately waited for a period of over one year after the delivery of the bill to lapse and then sprang s 128 of the Legal Profession Act 1976 ('LPA') provision upon the plaintiff based upon his misapprehension of the import of that provision. Neither the plaintiff nor the defendant had applied to the court for taxation of the gross sum bill and no agreement in writing had been entered into between the plaintiff and the defendant for a gross sum fee or for costing contentious business under s 116 of the LPA. The defendant had

grounded his s 218(2)(a) notice upon the contention that, as the gross sum bill had been delivered to the plaintiff on 27 November 2001 and the plaintiff had failed, as a party chargeable, to avail itself of the provision in s 126(1) of the LPA to petition for an order for taxation of the bill within the six months period stipulated therein, the said sum stated in the bill became a debt due and payable to him as a clear debt.

Held, granting the plaintiff's injunction:

(1) Unlike the law pertaining to a shareholder's winding-up petition, a creditor who intends to wind-up a company must bear the burden of having first to establish his creditor status by making out a case to the satisfaction of the court, either that the debt specified in the s 218 notice has been admitted or acknowledged or is clearly not bona fide disputed (see para 19). Therefore, the defendant in the current case had to show that there was an acknowledgement or admission of the 'sum' demanded in the s 218(2)(a) notice or to make out a cogent case that the debt was clearly due and owing to them. If the alleged debt is not sufficiently made out, then it is not a 'creditor' envisaged in s 218(2)(a) and its threat to wind-up the company is an abuse of the process of the court, because its real purpose is not to wind-up the company but to secure payment of the disputed debt without recourse to the common law court (see para 48).

(2) After the lapse of one year from the date of delivery of his bill, the solicitor may only sue for services rendered in a normal common law action, as he is precluded under s 128(2) from petitioning for an order for taxation. There is no deeming provision in the LPA, by virtue of which this court could hold that if the party chargeable fails to petition for an order for taxation within one year from the delivery to him of the bill of costs the amount stated in the bill would ipso facto be converted into a debt due and payable to the advocate and solicitor. Moreover, s124(2) of the LPA is merely designed to enable the solicitor to apply for an order for taxation after the expiration of one calendar month but within one year from the delivery of the bill; as he is then presumed to have complied with s 124(1) of the LPA. Clearly, there is no presumption that the amount in the bill thereby becomes due and owing. Consequently, as the said sum of RM11,425.51 in the bill was not presumed to be due from the plaintiff to the defendant, and a fortiori, the said bill itself had been at all material times vigorously resisted by the plaintiff, the issuance of the s 218(2)(a) notice was unwarranted and without justification (see para 54).

(3) By issuing the statutory notice the defendant had intended to avoid having to file an action in a common law court for recovery of his charges for professional services rendered (which was a proper course open to him),

as his right to obtain an order for taxation of his bill of costs within the stipulated one year period of the bill had lapsed by virtue of the provisions of s 126(1) read with s 128 of the LPA; and it could be viewed as an attempt to circumvent such provisions (see para 55).

(4) The s 218 notice issued by the defendant was an abuse of the process of court and a tactical ploy to bring unwarranted pressure to bear on the plaintiff to settle the vigorously and cogently disputed debt (see para 56). Consequently, there was bona fide and substantial dispute on the whole of the defendant's alleged claim and the defendant had failed to establish a debtor-creditor relationship between the plaintiff and the defendant. Hence, no question arose as to the plaintiff being 'unable to pay' or 'neglected to pay the sum' within the meaning and purport of s 218(2) of the Companies Act (see para 57).

[**Bahasa Malaysia summary**

Plaintif telah menggunakan khidmat guaman defendan untuk memulakan satu petisyen penggulungan terhadap pihak ketiga yang kemudiannya telah dibatalkan. Hanya setelah dua tahun selepas pembatalan petisyen penggulungan tersebut defendan telah mengeluarkan satu bil kasar (berbanding dengan bil terperinci) untuk RM11,425.51. Defendan mengatakan bahawa beliau telah menuntut bayaran jumlah tersebut tetapi plaintif telah gagal memberi respons. Defendan mengugut untuk menggulung syarikat plaintif. Plaintif memohon untuk satu injunksi sementara bagi menghalang defendan daripada mengemukakan satu petisyen penggulungan sehingga penyelesaian relif-relif deklaratori yang dipohon oleh plaintif iaitu antara lain, bahawa bil defendan berjumlah RM11,425.51 adalah melampau, tidak munasabah dan tidak sah dan bahawa defendan tidak berhak mendapat jumlah tersebut yang dipertikaikan. Sebagai jawapan, plaintif mengatakan bahawa meskipun ia telah mempertikaikan bil tersebut, defendan tidak menasihati plaintif untuk memohon taksiran bil tersebut tetapi dengan sengaja menunggu tempoh selama lebih setahun selepas penyampaian bil tersebut untuk melebihi had masa dan kemudian menggunakan peruntukan s 128 Akta Profesyen Undang-Undang 1976 ('APU') ke atas plaintif memandangkan salah faham plaintif mengenai peruntukan itu. Plaintif mahu pun defendan telah memohon ke mahkamah untuk taksiran jumlah kasar bil itu dan tiada perjanjian bertulis telah dibuat plaintif dan defendan untuk satu yuran jumlah kasar atau untuk kos urus niaga mahkamah begini di bawah s116 APU. Defendan telah mengasaskan notis s 218(2)(a) beliau berdasarkan hujah bahawa, memandangkan bil jumlah kasar itu telah disampaikan kepada plaintif pada 27 November 2001 dan plaintif telah gagal, sebagai satu pihak yang boleh dikenakan caj, menggunakan peruntukan s 126(1) APU untuk membuat petisyen bagi mendapat perintah taksiran bil dalam tempoh enam bulan seperti yang ditetapkan, jumlah yang dinyatakan dalam bil tersebut menjadi hutang yang tertunggak dan perlu dibayar kepada beliau sebagai hutang nyata.

Diputuskan, membenarkan injunksi plaintif:

(1) Berbeza dengan undang-undang berkaitan petisyen penggulungan pemegang sahan, pemiutang yang berniat untuk menggulung sebuah syarikat mempunyai beban untuk terlebih dahulu membuktikan status pemiutang beliau dengan menunjukkan wujud suatu kes yang meyakinkan mahkamah, sama ada hutang yang dinyatakan dalam notis s 218 itu telah diterima atau diakui atau adalah jelas tidak dipertikaian secara *bona fide* (lihat perenggan 19). Oleh itu, defendan dalam kes semasa hendaklah menunjukkan bahawa terdapat pengakuan atau 'jumlah' yang dituntut dalam notis s 218(2)(a) atau untuk membuat satu kes yang meyakinkan terdapat hutang yang nyata tertunggak dan perlu dibayar kepada mereka. Jika hutang yang dikatakan tidak dibuktikan secukupnya, maka ia bukan 'pemiutang' dalam s 218(2)(a) dan ugutannya untuk menggulung syarikat itu adalah satu penyalahgunaan proses mahkamah, kerana maksud sebenarnya adalah bukan untuk menggulung syarikat itu tetapi untuk mendapat bayaran hutang yang dipertikaikan tanpa mengikut process mahkamah 'common law' (lihat perenggan 48).

(2) Setelah luput setahun dari tarikh penyampaian bilnya, peguamcara hanya boleh menyamankan untuk perkhidmatan yang diberikan dalam tindakan 'common law' biasa, kerana beliau dihalang di bawah s 128(2) daripada membuat petisyen untuk satu perintah taksiran. Tiada peruntukan dalam APU, yang mana mahkamah ini boleh memutuskan bahawa jika pihak yang dikenakan caj gagal untuk membuat petisyen untuk satu perintah taksiran dalam tempoh satu tahun daripada penyampaian bil kos kepada beliau jumlah yang dinyatakan dalam bil tersebut akan *ipso facto* ditukar menjadi hutang tertunggak dan perlu dibayar kepada peguambela dan peguamcara itu. Tambahan pula, s 124(2) APU hanya digubal untuk membolehkan peguamcara memohon untuk taksiran selepas tamat tempoh sebulan tetapi dalam tempoh setahun daripada penyampaian bil; kerana beliau akan dianggap telah mematuhi s 124(1) APU (lihat perenggan 48).

(3) Adalah jelas, tiada andaian bahawa jumlah dalam bil tersebut menjadi tertunggak dan perlu dibayar. Berikutan itu, memandangkan jumlah RM11,425.51 dalam bil itu tidak dianggap sebagai terhutang daripada plaintif kepada defendan, dan fortiori, bil itu sendiri pada setiap masa ditentang oleh plaintif, pengeluaran notis s 218(2)(a) notis tidak diperlukan dan adalah tanpa justifikasi (lihat perenggan 54).

(3) Dengan mengeluarkan notis statutori defendan berniat untuk mengelak daripada memfailkan satu tindakan dalam mahkamah 'common law' untuk mendapat balik bayaran beliau untuk perkhidmatan profesional yang dikenakan (yang merupakan proses sesuai yang terbuka untuk beliau), kerana hak beliau untuk mendapatkan satu perintah taksiran untuk bil kos beliau dalam tempoh satu tahun bil itu yang ditetapkan menurut peruntukan s 126(1) dibaca dengan s 128 APU telah luput; dan ia boleh

dilihat sebagai satu percubaan untuk memintas peruntukan sedemikian (lihat perenggan 55).

(4) Notis s 218 yang dikeluarkan oleh defendan menyalahgunakan proses mahkamah dan taktik kotor untuk memberikan tekanan ke atas plaintif untuk menyelesaikan dengan segera dan terdesak hutang yang dipertikaikan itu (lihat perenggan 56). Berikutan itu, terdapat pertikaian secara *bona fide* dan berkesan berhubung keseluruhan tuntutan defendan yang dikatakan itu dan defendan telah gagal untuk membuktikan hubungan penghutang-pemiutang antara plaintif dan defendan. Justeru itu, tiada persoalan timbul tentang plaintif 'tidak mampu membayar' atau 'lalai untuk membayar jumlah tersebut' dalam maksud dan tujuan s 218(2) Akta Syarikat 1965 (lihat perenggan 57).]

Notes

For cases on bill of cost, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1941–1949.

For cases on inability to pay debt, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 949–1006.

For cases on injunction to restrain party from presenting winding up petition against company, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2723–2724.

For cases on injunction to restrain petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1007–1016.

Cases referred to

A Company, Re [1984] 1 WLR 1090 (refd)
Alaxtin Pty Ltd v Gordon Pacific Development Pty Ltd (1991) 9 ACLC 865 (refd)
American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504; [1975] 2 WLR 316 (refd)
Breen Holding Pty Ltd v Thiess Contractors Pty Ltd [1983] 1 ACLC 1069, 7 ACLR 956 (refd)
Bryanston Finance Ltd v de Vries (No 2) [1976] Ch 63; [1976] 1 All ER 25 (refd)
Burghes v Attorney-General [1911] 2 Ch 139 (refd)
Charles Forte Investments Ltd v Amanda [1964] Ch 240; [1963] 2 All ER 940 (refd)
Cuthbert Cooper & Sons Ltd, Re [1937] Ch 392 (refd)
Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2) (1986) 10 ACLR 305 (refd)
Dyson v Attorney-General [1911] 1 KB 410; [1912] 1 Ch 158 (refd)
Faibo Pty Ltd, Re (1989) 7 ACLC 19, 14 ACLR 518 (refd)
Gouriet v Union of Post Office Workers [1978] AC 435 (refd)
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536 (refd)
JB Kulim Development Sdn Bhd v Great Purpose Sdn Bhd [2003] 2 MLJ 298 (refd)
Lympe Investments, Re [1972] 2 All ER 383 (refd)
Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 2 MLJ 98 (refd)
Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 4 MLJ 657 (refd)

Pardoo Nominees Pty Ltd (1987) 11 ACLR 573 (refd)
Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178 (refd)
Processed Sand Pty Ltd v Thiess Contractors Pty Ltd (1982–83) 7 ACLR 956 (refd)
Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd [2000] 3 MLJ 465 (refd)
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 MLJ 313 (refd)
Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng [1992] 2 SLR 114 (refd)
Tweeds Garages Ltd, Re [1962] 1 Ch 406 (refd)
United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd [2000] 1 MLJ 385 (refd)
Yap Kim Kee & Sons Sdn Bhd [1990] 2 MLJ 108 (refd)
YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd [1996] 2 MLJ 482 (refd)

Legislation referred to

Companies Act 1936 [New South Wales] s 364(2)(a)
Companies Act 1948 [Eng] s 222(f)
Companies Act 1965 ss 218, (1)(e), (2)(a), 216, 254
Companies Act [Tas] s 364(2)
Corporations Law [Vic] s 460(2)(a)
Legal Profession Act 1976 ss 116, 121, 124, 126, (1), 128
Rules of the Hight Court 1980 O 14, O 18 r 19

SY Cham (Paul JL Quah with him) (Shaw & Co) for the plaintiff/applicant in encl 4 and respondent in encl 7.
David Hoh (Lim & Hoh) for the defendant/respondent in encl 4 and applicant in encl 7.

Vincent Ng J:

[1] In the legal fraternity one often hears of novel points of law and novel approach to resolve points of law. It has often been said to lawyers that, vis-a-vis their client and the court their hallowed and pre-eminent duty is to the court, but seldom has it been said of lawyers that they battle tooth and nail for their client's cause but then fight hammer and tongs for their clients' demise over their legal fees. Unfortunately, the case at hand before me is perhaps one such uncommon instance of a battle over a relatively paltry fee of RM11,425.51 allegedly due to the lawyer ('the defendant') from his client ('the plaintiff company') through the novel route of a threat to wind up the plaintiff company by issuance of a s 218(1)(e) read with s 218(2)(a) of the Companies Act 1965 ('theAct'). Be that as it may, even had it been the absurd fee of only RM501 (RM1 'exceeding five hundred ringgit in s 218(2)(a)), the same principles of law would be applicable. Indeed, this battle is set to continue, as the lawyer has lodged an appeal to the Court of Appeal against my decision, and I have thus to put my forensic ruminations on paper. On the bench in the distant past, I have presided over cases of other tactics used by lawyers to secure payment of, at times, exorbitant fees. But such stories may perhaps make interesting reading material in a judge's post-retirement or post-resignation memoirs

should he decide to write one — or he may perhaps potter around writing a few novels in the vain hope of hitting the 'Harry Potter' gong of success. I shall now first discuss the law and then the lawyer's case.

[2] The plaintiff had applied vide a summons-in-chambers (encl 4) for an interim injunction to prevent the defendant from presenting a winding up petition pursuant to s 218 of the Companies Act 1965 until the disposal of the declaratory reliefs sought by the plaintiff being, *inter alia*, that the defendant's bill amounting to RM11,425.51 is excessive, unreasonable and invalid, and that the defendant is not entitled to the said amount which is disputed. An injunction was first granted *ex parte* on 8 September 2003, and encl 7 is the defendant's application to set aside the *ex parte* injunction.

[3] While having to deal with the issue at hand, being the perennial topic of how does a lawyer earn his keep in the form of fees for his professional services rendered (in the present case, to his erstwhile charge), my ruminations also afforded an opportunity to discuss, as an aside to the real issue at hand for determination, the three great controversies in the realm of commercial law, namely: (a) the law on injunctions to restrain abuse of process in filing petitions for winding-up of companies; (b) the correct procedure on applications for injunctions to restrain abuse of process; and (c) the correct construction to be placed on s 218(2)(a) of the Companies Act 1965.

A THE LAW ON INJUNCTIONS TO RESTRAIN ABUSE OF PROCESS IN FILING PETITIONS FOR WINDING-UP OF COMPANIES

[4] Though the route taken by the defendant (lawyer) to secure his fees may be novel, the submission by his counsel, Mr David Hoh is not as novel as that taken by a counsel in another action for injunction (see my decision in Civil Suit No D1–24–129 of 2004) to restrain the filing of a winding-up petition under s 218(1)(e) read with 218(2) of the Act. Counsel in that case made a startling submission that: 'the touchstone consideration that the court would have to undertake, is whether the defendant's claim is bound to fail'; in other words, the onus is thrown upon the plaintiff (the company) to satisfy the court that the defendant's claim is bound to fail — before it could succeed to secure an injunction. In support of the application for an injunction learned counsel in that action cited the following five authorities, namely:

(a) *Charles Forte Investments Ltd v Amanda* [1964] Ch 240; [1963] 2 All ER 940 ('*Charles Forte*')

(b) *Bryanston Finance Ltd v de Vries (No 2)* [1976] Ch 63; [1976] 1 All ER 25 ('*Bryanston Finance*')

(c) *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1992] 2 SLR 1114 ('*Tan Choon Keng Realty*')

(d) *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465 ('*Sri Binaraya*')

(e) *JB Kulim Development Sdn Bhd v Great Purpose Sdn Bhd* [2003] 2 MLJ 298 ('*JB Kulim*')

[5] *Charles Forte* and *Bryanston Finance* are English Court of Appeal decisions, whereas *Tan Choon Keng Realty* is a Singapore decision of his Lordship Chan Sek Keong J (as he then was), and *Sri Binaraya* and *JB Kulim* are decisions of our High Courts (Malaysian cases).

[6] Upon careful reading of *Charles Forte*, *Bryanston Finance* and *Tan Choon Keng Realty*, I find that the above 'bound to fail' proposition of law advanced by learned counsel in that case is premised on manifest flaws of reasoning, nay, misreading and misapplication of *Charles Forte*, *Bryanston Finance* and Tan *Choon Keng Realty*, all of which cases, I must hasten to add, were decisions based on sound reasoning and law.

[7] The genesis of the similar views expressed in *Bryanston Finance* and *Tan Choon Keng Realty* is an earlier decision of the English Court of Appeal in *Charles Forte*. It is indeed remarkable that the rationally and legally correct ratio common in all these three authorities have thrown certain bewildering minds into a state of undue bewilderment, which have led to the counsel's aforesaid proposition of law; in his attempt to apply the principles that are essentially applicable to a shareholder's winding-up petition to that of a creditor's petition.

[8] Now, let us set out the factual matrix of the three leading cases of *Charles Forte*, *Bryanston Finance* and *Tan Choon Keng Realty* on this branch of law pertaining to granting of injunctions to restrain the filing of winding-up petition.

[9] All petitions for winding-up of companies under the Act could broadly be divided into only two categories, namely: petitions instituted by shareholders of a company, or petitions by creditors of the company. In the face of threat by a shareholder or a creditor to wind-up a company, the company may move the court for an injunction by invoking a facet the court's inherent jurisdiction to prevent a would-be litigant from abusing its process. It is important to distinguish this specie of injunction (the first or non traditional specie) from the other specie (the second or traditional specie), where the court's jurisdiction is invoked to restrain a party from taking some action which is alleged to be in violation of the litigant's legal right until the court has decided whether he has that right and whether it has been or will be violated. Thus, clearly, unlike the second specie, the first specie should not be described as an interlocutory or interim injunction, for as soon as the court has decided whether or not to grant the injunction the proceeding is at an end and there is nothing left to try — in other words, there is no cause of action left to be later tried. Indeed, in my view, no cause of action in the conventional sense, need be pleaded in the case of the first specie of injunction; though to my surprise, some lawyers have submitted otherwise before me. Similarly, in cases where declaratory reliefs are sought, no cause of action in the traditionally sense need to exist. This principle was first enunciated in the landmark cases of *Dyson v Attorney-*

General [1911] 1 KB 410; [1912] 1 Ch 158. The decision and spirit of *Dyson* served to guide the courts in subsequent cases, and to encourage resort to declaratory proceedings. In *Burghes v Attorney-General* [1911] 2 Ch 139 at p 155 — decided shortly after *Dyson* case — Warrington J held that O 25 r 5 (English Rules) was intended to deal with the very case where there was no cause of action. And, in *Gouriet v Union of Post Office Workers* [1978] AC 435 at p 501, Lord Diplock felt that the position was now so clear that he said: 'Theearly controversies was to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten'. (See also *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536.)

[10] It stands to reason that since the first specie of injunction is not grounded upon any cause of action for subsequent adjudication and the injunction sought is not in the nature of an interim or interlocutory injunction, the principles established in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] 2 WLR 316 (HL), which places an onus on the plaintiff to prove that there is a serious issue to be tried in his action and on the balance of convenience, are inapplicable. In this regard, I think it is apposite here to set out the brilliant ratiocination of Stephenson LJ in *Bryanston Finance* as expressed logically in the following language (at pp 36 and 37):

> There, in my opinion, the judge attempted to do an impossible thing: to decide on the balance of convenience whether there is an abuse of the process of the court. He was persuaded to confuse two distinct things: (1) the court's jurisdiction to prevent a would-be litigant from abusing its process; (2) the court's jurisdiction to help a would-be litigant by preventing another from taking some action which is alleged to be in violation of the litigant's legal right until the court has decided whether he has that right and whether it has been or will be violated. Completely different considerations apply to the two cases. In the first it is for the plaintiff to prove that the defendant's exercise of his right to bring legal proceedings is in fact an abuse of process; in the second it is for the plaintiff to prove that there is a serious issue to be tried in his action, not the defendant's, and that it is convenient that the court should intervene to restrain the defendant before it is tried.
>
> It is the practice for a company which objects to a shareholder improperly presenting a petition to wind it up to move for an injunction to restrain him. The court's jurisdiction to do so is a facet of his inherent jurisdiction to prevent an abuse of its process: *Charles Forte Investments Ltd v Amanda* [1963] 2 All ER 940; [1964] 1 Ch 240 and *Mann v Goldstein* [1968] 2 All ER 769; [1968] 1 WLR 1091.

[11] And, his Lordship further said:

> Counsel for the plaintiff company sought support for the judge's approach and order in the concluding sentence of the judgment of Jessel MR in *Niger Merchants Co v Capper* [1877] 18 Ch D 557 at 559). He claimed support there for his submission that the injunction he prayed was only interlocutory, that there was a serious issue to be tried after it had been granted or refused, and that at this stage the balance of

convenience had therefore to be considered and the American Cyanamid case applied. But the hearing to which the sentence refers was clearly a hearing of conflicting evidence on the question whether Mr Capper did threaten the company with winding-up, which he denied, and that case is no authority for the proposition that a plaintiff company, which moves for an injunction to restrain the presentation of a petition to wind it up as an abuse of the process of the court, can rely on a balance of convenience and reserve its evidence to prove the abuse until the question whether it is an abuse is finally decided at the trial of the action. I agree with SirJohn Pennycuick, whose judgment I have had the privilege of reading, *that it is finally decided at this stage and there is nothing left to try*.

This is not 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiffs legal right', but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley LJ has quoted do not apply to such an application as this. Their Lordships do not seem to have had this sort of injunction in mind and they cannot have overruled Forte's case by implication, Fortes case still binds us to hold that unless the plaintiff company can prove that a petition is bound to fail — *or perhaps that there is a suitable alternative remedy to a petition* — Mr de Vries cannot be restrain, even temporarily, from presenting it. Oliver J has found that it might succeed. (Emphasis added.)

[12] The distinctive nature of the first specie of injunction to restrain abuse of process of the court is also aptly and succinctly put in *Bryanston Finance* by another member of the appeal board, Sir John Pennycuick, who said (at p 38 j):

I should like to add that where a company seeks relief of this kind the procedure by way of writ claiming an injunction to restrain presentation of a petition, followed immediately by a motion expressed to claim an interlocutory injunction in the same terms, appears clumsy and inapposite. It occurs to me that it should be possible to devise some more apt form of procedure, for instance, an originating motion in the Companies Court.

[13] For the purpose of the present judgment it is pertinent to note that *Bryanston Finance* concerns an injunction sought by Bryanston Finance Ltd ('the plaintiff') against one Juda de Vries ('the defendant') who held 62 shares in a Bryanston Finance Ltd whose issued capital was 7,414,938 shares. The plaintiff moved the court for an injunction after its chairman and managing director received a letter in February 1975 from the defendant stating that if no reasonable reply or explanation were received within two days, to the various questions raised by him relating to an entry in the 1973 company accounts, he would petition to wind-up the company under s 222(f) of the Companies Act 1948 (English Act) on the ground that it is just and equitable to do so. There were also other (quite immaterial here) roll-over procedural developments in the continuing saga of skirmishes waged by this paltry shareholder and the chairman cum managing director of the plaintiff company which resulted in its two injunction applications.

[14] *Tang Choon Keng Realty* which followed *Bryanston Finance*, also concern the case of a shareholder and director, one Tan Wee Cheng ('the defendant') who threatened to proceed to file a petition for the winding up of M/s Tan Choon Keng Realty (Pte) Ltd ('the first plaintiff') under s 216 and/or s 254 of the Companies Act (Cap 50, 1990 Ed) unless the second and third plaintiff (the defendant's brothers who were also shareholders and directors of the first plaintiff) could come up with constructive proposals to resolve the conflict between the parties. In *Tan Choon Keng Realty*, with particular reference to the question of whether it would be unjust to shut out a shareholder from exercising his statutory right, Chan Sek Keong J (as he then was) took a strikingly distinctive rhetorical approach to this issue in his judgment, under 'General Considerations' which is worth quoting (p 1124 at H and 1125 at B to F):

> Before I examine these decisions, I should like to make the following preliminary observations in order to put the problem in its proper perspective:
>
> (5) if, at the hearing a permanent injunction is granted, no injustice will have been done to TWC; but, if the court refuses to grant the injunction, TWC will still have to file his petition/s, and TCKR and/or TWS and TWK may or may not be able to oppose the petition/s, depending on whether issue estoppel operates and that may depend on the reasons given for the refusal;
>
> (6) moreover, the plaintiffs will be entitled to appeal against a refusal to grant a permanent injunction, and, given the circumstances of the case, are likely to do so; in any case, the right of appeal exists;
>
> (7) consequently, no aggrieved shareholder, unless he has financial resources and also the will, may be in a position to obtain any remedy from the court for any 'wrong that a company may have done to him, and if he has, it may take him a long time to obtain his remedy;
>
> (8) in these circumstances, the following public policy considerations need to be considered:
>
> (a) should litigation of this nature be extended or prolonged in this way?
>
> (b) should the court put itself in a position to hear a dispute twice when it can do so once?
>
> (c) should a minority shareholder, who may not have the same financial resources as the company, be denied equal access to the court by the company resorting to a pre-emptive strike of this nature?
>
> (d) should potential or actual irreparable loss to a company and its related companies be a countervailing factor against the right of a shareholder to protect his rights as a member?
>
> (e) how should the court balance the two conflicting interests?

[15] Most certainly, their Lordships must have mulled over the obvious answers to the potent Socratic questions such as those posed by Chan Sek Keong J in para 8 above, that the English Court of Appeal were driven to adopt the 'bound to fail' test in *Forte* and *Bryanston*.

[16] In *Charles Forte*, Amanda ('the defendant') who was a shareholder of Charles Forte Investments Ltd ('the plaintiff company') wrote a letter to the company threatening to present a winding-up petition if the company refused to register the transfer of those shares sold by Amanda to third parties. In this case, Pennycuick J refused to continue the injunction. However, on appeal, the Court of Appeal allowed the appeal on the grounds, *inter alia*, that as the directors had an absolute and uncontrolled discretion not to register the transfers, the petition was bound to fail, unless the directors had acted in bad faith, and there was no possible chance that Amanda could make good his allegations in that respect. And, most importantly, that even if Amanda's allegations could be substantiated, a winding-up petition is unnecessary as there were alternative and more suitable remedies, namely, an action for ratification of the register. applying *Re Cuthbert Cooper & Sons Ltd* [1937] Ch 392 which the court held was binding on them.

[17] Though I am completely *ad idem* with both the rationale and *ratio decidendi* in *Charles Forte*, *Bryanston Finance* and *Tang Choon Keng Realty* which declared that the principles laid down in *American Cyanamid* case is inapplicable to the first (non traditional) specie of injunction applications, yet nevertheless, the pertinent issue in an application for injunction against an alleged creditor is whether a distinction ought to be made, in the court's approach when considering whether to grant an injunction against a shareholder as opposed to a creditor of the company.

[18] Clearly, in my considered view, the 'bound to fail' ratio established in *Charles Forte*, *Bryanston Finance* and *Tan Choon Keng Realty* — all of which cases concern shareholders' winding-up petitions — should not be read as decisions applicable to creditors' winding-up petitions (for debts) under s 218(1)(e) read with s 218(2)(a) of the Act. Surely, the language and reasoning in these three cases indicate that those cases are no authority for the proposition that the onus is on a plaintiff company, which seeks an injunction against the presentation of a winding-up petition grounded upon an alleged debt claimed by a creditor, to satisfy the court that the creditor's claim is bound to fail. It is important to note that the rationale in all the three decisions are predicated upon the question of a shareholder's statutory right to protect his rights as a member of the company rather than the right of a creditor of a company to enforce his debt claim through a petition to wind-up the company.

[19] I am of the considered view, and I hold that, unlike the law pertaining to a shareholder's winding-up petition — where the company which move for an injunction would have to show that the shareholder's intended petition to wind-up the company is bound to fail — a creditor who intends to wind-up a company must bear the burden of having first to establish his creditor status by making out a case to the satisfaction of the court, either that the debt specified in the s 218 notice has been admitted or acknowledged or is clearly not bona fide disputed, considering the undisputed contemporaneous document or documents adduced in the supporting affidavit(s).

[20] My reasons for this view are:

(1) The right of a shareholder to petition the companies court for a winding-up order in appropriate circumstances is a specific and pointed right conferred by statute. Indeed, the fact that he has *locus standi* as a shareholder is never disputed, whereas an alleged creditor has no *locus* under the Act unless he is able to first establish his status as a creditor by showing to the satisfaction of the court the fact that the debt is due and owing to him. The words 'debts' in s 218(i)(e) and 'a creditor' in s218(2)(a) are words of weighty significance, and it is axiomatic that there cannot be a debt without a creditor.

(2) Unlike a shareholder whose right of relief is primarily or exclusively prescribed within the four corners of the statute, namely, the Companies Act 1965, a creditor is clothed with ample recourse to seek relief in the common law courts which is normally and quite invariably done. Thus, it is pertinent to note that even when an injunction is sought against a shareholder of a company, the courts have held that if it could be demonstrated that the shareholder has a more appropriate alternative remedy, for example, ratification of the register of the company, as in *Charles Forte*, the court would favour the company with an injunction.

(3) Should this court rule that, to secure an injunction against the filing of a winding-up petition, the onus is on the company sought to be wound-up to satisfy the court that the creditor's claim is 'bound to fail', most litigants who claim to be creditors would take the short-cut petition for winding-up route to enforce their claims rather than to have recourse to the common law courts. Indeed, such heavy onus of proof if placed on the company would result in the companies court being inundated with a welter of winding-up petitions, which may lead to irretrievable damage to a company's business and reputation, and far-reaching effects consequential upon the ensuing mandatory gazettal and advertisement entailed in a petition. The courts must firmly deprecate such proclivity for shortcuts in normal recovery of debts. Surely, the punch-line of this point could be stated thus: in a common law civil action the standard of probity and cogency required of a plaintiff in order to succeed in his O 14 application for summary judgment is markedly higher than the 'bound to fail' test if the onus of such test is instead thrown upon a defendant in the civil action.

[21] Shortly put, the 'bound to fail touchstone' onus on the company proposed by the counsel in Civil Suit No D1–24–129 of 2004 is, I would say,

rather stonedead. For the foregoing reasons I am constrained to conclude, with the greatest respect, that the two Malaysian cases *Sri Binaraya* and *JB Kulim*, which concern creditors' winding-up petitions, were decisions — grounded upon the 'bound to fail' test — that were amiss in rationale and based on wrong application of *Charles Forte* and *Bryanston Finance*, a methodical and analytical rather than a quote-and-apply approach ought to have been adopted in decision making process on intricate issues such as this. In *Sri Binaraya*, a creditor claimed an alleged debt of RM2,108,820.22 from the company for a construction work and *JB Kulim* concerns a claim for RM853,015.79 by the defendant in respect of a construction project where the defendant was appointed by the plaintiff company as a contractor. Indeed, in *Sri Binaraya*, the matter before the learned judge was a motion filed by the company to move the court to strike the winding-up petition under O 18 r 19 Rules of the High Court 1980 and not an application for injunction.

[22] Another point of note is that there is unequivocal dicta in *Bryanston Finance* which proscribes the invocation of the principles in *American Cyanamid* in striking out applications, as Stephenson LJ had this to say: '... the method of applying does not transform the substance of the proceedings or the nature of what the applicant has to prove. If he applied to strike out the petition under the inherent jurisdiction, or under RSC O 18, r 9(1)(d) and (3), he would not be able to rely on anything said by the House of Lords in *American Cyanamid Co v Ethicon Ltd* or on the balance of convenience...'.

B THE PROCEDURE ON APPLICATIONS FOR INJUNCTIONS TO RESTRAIN ABUSE OF PROCESS

[23] It may perhaps be appropriate, in the context of controversy (a) above, to express my ready concurrence with the views expressed by Sir John Pennycuick in Bryanston Finance about the 'clumsy and inapposite' form of procedure often adopted by a plaintiff company which seeks relief in terms of the aforesaid non traditional, first specie of injunction, It is, in my view, an inappropriate procedure if the real and predominant purpose of the application is only to restrain the filing of the petition, as happened in Bryanston. This inapposite procedure is a common phenomenon in my Commercial Division, which creates an artificial backlog of civil suit files. This artificial back-log occurs when the file bearing the writ itself (encl 1) is not closed after the final disposal, vide inter parties hearing, of the related summon-in-chambers (which bears a different and subsequent enclosure number) for injunction. For this reason I would commend the mode of procedure adopted by the plaintiff in Civil Suit No D1–24–129 of 2004, as I have, since I assumed office over three years ago as head of the Commercial Division, directed my division to accept certificates of urgency where such applications for injunctions (merely to restrain the filing of winding-up petitions) have been instituted under originating summons coupled with summons-in-chambers.

C THE CORRECT CONSTRUCTION TO BE PLACED ON SECTION 218(2)(A) OF THE COMPANIES ACT 1965

[24] There are several conflicting decisions at various levels of our courts concerning the issue of whether the sum claimed in the s 218 notice is invalid if such sum exceeds the true amount due. This entails a decision on whether s 218(2)(a) of the Act should be assigned a strict or literal interpretation rather than a liberal or wide interpretation.

[25] Section 218(2)(a) of the Act reads as follows:

> 218(2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;'

[26] The true construction of the underscored words '... to pay *the su*m so due and ... has ... neglected *to pay the sum*' in s 218(2)(a) of our Act and similar provisions in the Australian Enactments has caused considerable difficulty in Australian courts and our courts. And, the rationale advanced for the two conflicting views by both sides of the divide as to whether the words should be assigned a strict or liberal construction are almost equipollent. I hope to be able to tip the scales and my reasons would be set out in detail later.

[27] The relevant Australian and Malaysian cases on this issue are as follows:

(a) *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd* (1982–83) 7 ACLR 956 ('*Processed Sand*')

(b) *Re Fabo Pty Ltd* (1988) 14 ACLR 518 ('*Re Fabo*')

(c) *Re Pardoo Nominees Pty Ltd* (1987) 11 ACLR 573 ('*Re Pardoo*')

(d) *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 ('*Re Perusahaan Jenwatt*')

(e) *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 ('*Sri Hartamas*')

(f) *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 MLJ 385 ('Richland Trade')

(g) *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 2 MLJ 98 ('*Malaysia Air Charter* — Court of Appeal')

(h) *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 ('*Malaysia Air Charter* — Federal Court')

[28] The ratio in *Processed San*d was adopted by Zakaria Yatim J in *RePerusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ held 178 who that the words 'topay the sum so due ... has ... neglected to pay the sum' in s 218(2)(a) should be strictly and literally construed. Though I would wholly support — and I am inclined to adopt — the ratio decidendi in *Perusahaan Jenwatt*, yet it is my observation that there is a dearth of expressed rationale or ratiocination laid out by the learned judge in that judgment (a similar observation could also be made on his Lordship's other decision in *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108. This decision was arrived at upon evaluation of two conflicting decisions that emanated from Australian courts, namely, *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd*; *Breen Holding Pty Ltd v Thiess Contractors Pty Ltd* [1983] 1 ACLC 1069, 7 ACLR 956 and *Re Faibo Pty Ltd* [1989] 7 ACLC 19, 14 ACLR 518.

[29] In *Processed Sand*, the Supreme Court of New South Wales decided that a notice of demand which claimed more than the amount actually due would not come within s 364(2)(a) of the Companies Act and non-compliance with it would not give rise to any deemed inability on the part of the company to pay its debt. Section 364(2)(a) of the Companies Act is in *pari materia* with our s 218(2)(a). This decision was also followed by the same court in *Deputy Commissioner of Taxation v Cye International Pty Ltd (No 2)* (1986) 10 ACLR 305.

[30] In *Processed Sand* Waddel J in his judgment had reasoned as follows:

> But there are, in my opinion, much stronger considerations which indicate that the provision should be given a literal interpretation. Its effect is to provide a statutory admission that a company is unable to pay its debts. One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary and unjust to create an admission arising on failure to pay ... a debt, a part of which was not due.

[31] *Processed Sand* is consistent with the views expressed by the court in England in *Re A Company* [1984] 1 WLR 1090 wherein Mervyn Davis J in his judgment (at p 1095) said:

> When the demand was made, the amount due to the petitioner was not known to the company…. At the time of the demand the company knew there was a dispute and were willing to pay £2,234.38 but that is not to say that they knew that the sum due was £2,234.38. They knew that the petitioner was alleging the sum due to be £12,435.75. As to the petitioner, it knew that the company were disputing liability in that sum. In these circumstances I do not see how the petitioner was in any position to make a genuine demand for a specified sum. Section 223(a) contemplates a creditor being able to point to a debt of a specified sum that cannot be seriously questioned either as to existence or quantum. It follows that the petitioner was not at liberty to make use of s 223(a) ... I am satisfied that the statutory demand ought not to have been served ...

[32] The conflicting view in *Fabo Pty Ltd* was that:

> A literal interpretation would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed due debt exceeding $1000 has remained unpaid after the making of a proven demand without any reasonable explanation being advanced for this failure to do so. ... By contrast, the wider interpretation avoids such unfortunate consequences, is consistent with the legislative scheme underlying the provisions and permits the court to make a winding-up order for it is appropriate do so.

[33] And, it was further opined that:

> Commercial reality demands that preference be given to an interpretation that will remove from unmeritorious respondents the *temptation to undertake an investigation into the exactness of the debt claimed to be owing* on the relevant date in cases where complicated accounts or running accounts with daily adjustments may render probable the risk of some small errors having been made in the course of ascertaining with precision the extent of the debt. Indeed, the possibility exists that a contrary interpretation might lead to the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly appropriate. (Emphasis added.)

[34] The ratio in *Perusahaan Jenwatt* was supported and affirmed, though per curiam, by the Supreme Court in *Sri Hartamas* when it expressed its (obiter) opinion that it agreed with Zakaria Yatim J that a statutory demand does not fall within s 218(2)(a) of the Act if the amount in the demand exceeds the sum actually due.

[35] *Sri Hartamas* was followed by the Court of Appeal in the words of Shaik Daud JCA in *Malaysia Air Charter* — Court of Appeal, who had this to say (at p 165):

> The Supreme Court while endorsing that s 218(2)(a) ought to be strictly interpreted went on to say that a demand does not fall within s 218(2)(a) if the amount demanded exceeds the sum actually due, and held that in that case the statutory demand was not bad or invalid, as it was made in writing and was signed and delivered at the registered address of the appellants and it had specified the actual amount due. We believe what the Supreme Court was saying is that the amount due is the judgment sum including interest. *Although the statutory notice in Sri Hartamas did not quantify the interest due, nevertheless the Supreme Court held that it was a good and valid notice*. In the final analysis the purpose of the statutory notice is to demand the judgment sum inclusive of the interest, quantified or otherwise, and if not paid within the stipulated period of three weeks, is to warn the debtor of an impending petition. *Had the notice mentioned a sum in excess of the judgment sum then such notice would not have strictly complied with s 218(2)(a) and thus would be bad and invalid.* We are bound by the decision in *Sri Hartamas*. Since the notice in the present appeal is similar with that in *Sri Hartamas*, we hold that the notice, although it did not quantify the interest due, was made in writing and was signed and delivered by the respondent's authorised agent at the appellant's registered address and it was specified the actual sum due which was not disputed, was a good and valid notice. (Emphasis added.)

[36] However, the above settled law was upset by the decision of the Federal Court in *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 ('*Malaysia Air Charter* —Federal Court'), where the following two questions of law were framed for its decision:

(i) whether s 218(2)(a) of the Act is to be interpreted literally and strictly or widely and liberally; and

(ii) in the event that the literal and strict interpretation is adopted, whether a s 218 notice must quantify and specify the exact and actual sum due as at the date of the demand and leave no further sums to be calculated by the recipient of the notice.

[37] Though in *Malaysia Air Charter* — Federal Court had held that s218(2)(a) ought to be construed widely and liberally, it is highly pertinent to note that the crucial issue involved therein was not whether the sum demanded in the s 218 notice was over-stated or excessive, but whether the sum demanded ought to be stated with more precise particularity. The s 218(2)(a) notice in the *Malaysia Air Charter* was based on a judgment, and the statutory demand was for 'the judgment sum of RM334.118.79 together with interest thereon at the rate of 8% per annum on all outstanding sum from 28 October 1988 until date of realisation'. Thus, as in *Sri Hartamas*, there was a similar failure to compute or quantify the interest element of the sum demanded, where the statutory demand was for 'the sum of RM5,197,060.82 together with interest thereon at the rate of 17% pa from 1 December 1986 until date of realisation and costs of RM400'. Yet, it is clear in both these cases that the demand was not for a larger sum but for the sum actually due, as interest awarded under the judgment is obviously due and quantifiable so long as the principal amount has not been paid. Therefore, it cannot be said that the said s 218(2)(a) notice was in excess of the sum 'then due'. Perhaps, the first question for determination before the Federal Court in *Malaysia Air Charter* was wholly unnecessary or was inappropriately framed vis-a-vis the true issue that the Federal Court was seized with in the appeal. Indeed, in both *Malaysia Air Charter* (at both appeal levels) and in *Sri Hartamas* it was never contended by the respondent company that the amount demanded in the s 218(2)(a) notice was excessive or over-stated. My view is confirmed by the very language used by the Federal Court in *Malaysia Air Charter* when it observed (see p 450g:

> ... Thus, if we were to interpret the section literally or strictly, it means no winding-up order could be made as the exact amount due *as at the date of the notice has not been quantified*, notwithstanding that the debt exceeded RM500 and remained unpaid. (Emphasis added.)

[38] Similarly in *Sri Hartamas* the Court of Appeal stated (at p 317D to H):

> Although the amount stated in the notice of demand in this case was not in dispute, counsel for the appellants in his written submission also cited *Re Perusahaan Jenwatt Sdn Bhd*, in which case Zakaria Yatim J held, *inter alia*, that the notice of demand must comply strictly with the requirements of s 218(2)(a) of the Act.

Inthat case, his Lordship held that the notice of demand had not complied strictly with the requirements of s 218(2)(a) because the amount stated in the said notice was far in excess of the debt due and the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts. The High Court therefore held that the notice of demand was bad and that the court could not presume that the company was unable to pay its debts. ... As stated above, although the amount due was not in dispute in this case, we would nevertheless take this opportunity here to agree with Zakaria Yatim J that a demand does not fall within s 218(2)(a) of the Act if the amount demanded exceeds the sum actually due. (Emphasis added.)

[39] With the deepest respect, *Malaysia Air Charter* – Federal Court suffers from a somewhat similar infirmity as that of *Sri Hartamas* (p 451 h) which attracted the Federal Court's comment (on *Sri Hartamas*) that:

... With respect, we consider this passage in the judgment of Gunn Chit Tuan SCJ obiter because the claim of the excess sum in the notice was never an issue before the court.

[40] Clearly, the appeal to the Federal Court in *Malaysia Air Charter* was not concerned with the question whether the amount demanded in the s 218 notice was excessive but whether the s 218 notice was invalid if the sum due was not clearly specified and quantified notwithstanding the fact that the sum claimed was based on a judgment obtained which was not challenged by the respondent. Consequently, in my opinion, with the greatest respect, the views expressed by the Federal Court in *Malaysia Air Charter* should not be applied to upset the ratio in *Re Jenwatt*.

[41] It is pertinent to note that, prior to *Malaysia Air Charter* — Federal Court, another panel of the Federal Court, in *Richland Trade*, had already affirmed a decision of and wholly agreed with the views expressed by the Court of Appeal, which include the following passages (quoted by the Federal Court at pp 62 and 63): 'In order for the demand to be effective, however, itmust comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due (no mention is made of quantifying it to the last cent)'; and that, 'the demand need not exactly quantify the amount unlike in the Bankruptcy Notice'. Notably, this decision was arrived at by the Federal Court without the calling into question or impugning the ratio in Perusahaan Jenwatt, which advanced a literal interpretation of the said words in s 218(2)(a). In *Richland Trade* it was contended that the statutory notice was invalid as the interest was not quantified but was demanded as 'interest of RM64.69 per day from 26 October 1991 till date of full settlement'.

[42] I do not see how the statutory notice in *Malaysia Air Charter*, which fail to compute the interest on the judgment, could be fatal to the petitioner's cause, irrespective of whether the said words in s 218(2)(a) should be interpreted

literally or liberally, since the gross judgment sum due inclusive of interest could be easily and readily be computed by the respondent company. I am fortified in this view by the decision in *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd* [1996] 2 MLJ 482 where one of the two grounds raised in the appeal to the Court of Appeal was that the interest on the principal amount on the judgment in default had not been quantified in the statutory notice of demand and therefore is defective ad invalid. The appellate court held that the notice was valid and had this to say: 'It must also be remembered that what occurred in this appeal is that the quantum of the interest could be arrived at after a calculation is made and that the quantum does not inflate that debt to a figure that exceeds the total debt owed by the company as in the case from Australia, *Re Tweeds Garages Ltd* [1962] 1 Ch 406, *Re Perusahaan Jenwatt Sdn Bhd* and *Re Yap Kim Kee & Sons Sdn Bhd* referred to above.

[43] The real crux of the problem concerning whether to apply the strict construction or the liberal construction to the statutory provision that the Australian courts has also had to deal with, is illustrated in *Re Pradoo* (a Supreme Court of Tasmania case). In that case the plaintiff had served a statutory notice of demand on the defendant company for A$176,431.40 pursuant to s364(2) of the Companies Act (Tas), where the actual amount owing and not seriously disputed on the date of demand was A$172,434.81. Thus, the differential in the amount overstated was paltry or trifling. This was also the case in *FaboPte Ltd* where the statutory demand was for A$131,469.82, comprising a judgment debt and interest which was not disputed, whereas two other small sums and costs of A$19.60 were disputed. Similarly, in *Alaxtin Pty Ltd v Gordon Pacific Development Pty Ltd* (1991) 9 ACLC 865, the applicant issued a statutory demand under s 460(2)(a) of the Corporations Law (Victoria) for a judgment debt plus interest accrued. Due to a miscalculation the demanded sum of A$552,484.22 was in excess of the amount then owing by a paltry A$4.53. The sole dispute was that it was not the actual precise sum due. In my opinion, due to this relatively paltry sum differential — a striking feature common in all the three cases — those courts was driven to reject the literal construction advocated in *Processed Sand* in favour of the liberal construction, and held that the statutory deeming of inability to pay debt was triggered into operation. With the greatest respect, I could not fathom why in those three cases the Australian courts did not approach the conundrum by invoking the principle embodied in the maxim *deminimis non carat lex* (the law does not concern itself with trifles) to resolve the problem, without disturbing the literal construction advocated in *Processed Sand*. In other words if the differential in the amount demanded in the statutory notice and the amount admitted or found to be not disputable is relatively paltry or trifling, the literal construction could still be adopted, with the deminimis principle invoked to obviate the absurdity of rejecting the validity of the notice due to 'the exactness of the debt claimed to be owing at the relevant date' being disputed. We have to be mindful that a cut and dry approach may sometimes result in absurdities on both ends of the scales; and this controversy is one of them.

[44] On the principle of stare decisis, the ratio in *Malaysia Air Charter* — Federal Court is binding upon all courts below. Fortunately, the controversy on the question of whether the words 'the sum' in s 218(2)(a) of the Act should construed literally or liberally would have no bearing on my decision the plaintiff's application now before.

[45] For all the above reasons, and bearing in mind the views of the Supreme Court in *Sri Hartamas* (which favoured the literal construction) in the context of the Federal Court's decision in Richland Trade implicitly affirming such a construction, I would, in the interest of just implementation of s 218(2)(a), with the greatest respect, suggest that the decision in *Malaysia Air Charter* — Federal Court be revisited with the view to restoring the ratio in *Perusahaan Jenwatt* but subject to the application of the diminimis principle where appropriate. My further reasons are as follows:

(a) A liberal construction of the words 'the sum so due' in s218(2)(a) if adopted would, in my carefully considered view, cause mischief and injustice in implementation. This is best illustrated in the following example: should the court find that only a sum of, say, RM501 — out of the sum of RM500,000 in the statutory (demand) notice to be due and owing to the petitioner, the latter thereby achieves the status of a 'creditor' under the provision and the presumption of insolvency of the company would ipso factor arise. The brutal yet entirely material question often asked in a reasoning process is: on the quantum, where do you draw the line?

(b) Under accepted and established cannons of construction of statutes, courts should not depart from the literal interpretation of words in a statute unless very cogent reasons are advanced or a literal construction would result in an absurdity.

(c) Though I am inclined to agree that literal construction of the words aforesaid with the view to require exactness of the amount of the debt claimed without invocation of the deminimis principle, may entail an absurd result, yet commercial reality also demand that respondent companies be not lumbered with the deeming provision of insolvency triggered into operation upon the court's finding, after undertaking investigation a la a common law court, that a fraction of the amount specified in the s 218(2)(a) notice that is over RM500 is due and owing.

(d) Clearly, the legislative intention or scheme of the provision in s 218(2)(a) is to allow issuance of a statutory notice where the debt exceeds RM500, rather than to set the minimum figure of the debt to be proved irrespective of the largeness of the amount demanded. Incidentally, I have in the past advocated for legislative intervention to increase the RM500 to, say

RM50,000 or RM100,000 in order to curb the flood of winding-up applications in our commercial courts.

(e) It would seem arbitrary and unjust to create an admission or to reject the non admission of a small portion of the alleged debt specified in the s 218(2)(a) notice when the much larger part of such debt is shown bona fide to be in dispute, and then to impose upon the respondent company a presumption of insolvency arising upon failure to meet the demand on the whole specified sum; whilst it would be unwise, or could even be fatal, for the company to offer to pay or to tender payment of the substantially lesser non-contested amount after receipt of the statutory demand notice. To hold otherwise would mean that the presumption of insolvency would almost invariably be triggered into operation upon expiry of 21 days from service of the s 218(2)(a) notice where a substantially lesser sum is found to be due.

(f) The court should not condone a clear abuse of process on the part of a creditor who deliberately formalise a statutory demand in gross excess of the sum due and then cast on the company the onus to disprove the amount of debt overstated or to see what the winding-up court could find, simply because the creditor has elected to recover his debt through the s218(2)(a) route, which would be open to abuse particularly in cases of demand not based on a judgment sum. In my view it would not be just and equitable for a presumption of company-insolvency to be imposed in such circumstances.

(g) Surely, a demand where there is a failure to compute the interest due on a judgment sum (notably, all the above Malaysian Supreme Court and Federal Court cases concern statutory notices based on final judgments of the court) should not stand on the same footing as a demand which is not based on a judgment debt, where the sum claimed is clearly in gross excess of the sum that the creditor is entitled to — since he is not entitled to payment of it and therefore not entitled to demand for it.

THE CASE AT HAND

[46] Now, let us turn to the issue in the current case that this court is seized with. The plaintiff had engaged the defendant's legal services to commence a winding up petition against MBF. The winding up petition was subsequently struck out on the grounds, inter alia, that the service of the statutory notice was irregular. It was only after two years of the striking out of the above-mentioned winding up petition that the defendant issued a gross bill for

RM11,425.51. The plaintiff and defendant had a long standing professional relationship previously and the plaintiff had contended that it had orally disputed the above sum at all material times. The plaintiff had made progressive payments totalling RM3000 upon the defendant's request for disbursements through three payments of RM500, RM1,000 and RM1,500 dated 18 June 1998, 16 November 1998 and 2 March 1999 respectively. These disbursements were accounted for in the final bill delivered to the plaintiff dated 27 November 2001 for the legal services rendered. The defendant alleged that he had written five letters dated 20 August 2002, 25 June 2002, 25 September 2002, 11 October 2002 and 3 January 2003 demanding payment of the sum of RM11,425.51 but the plaintiff had failed to respond. In answer, the plaintiff stated that though it had disputed the bill, the defendant had not advised the plaintiff to apply for taxation of the bill but had deliberately waited for a period of over one year after the delivery of the bill to lapse and then sprang s 128 of the Legal Profession Act 1976 ('LPA') provision upon the plaintiff based upon his misapprehension of the import of that provision.

[47] I would first have to recognise the following salient facts that are common ground between the parties: that the defendant served or delivered only a gross sum rather than a detailed bill in the amount of RM11,425.51 to the plaintiff on 27 November 2001: that the bill was in respect of work done on a contentious matter; that neither the plaintiff nor the defendant had applied to the court for taxation of the gross sum bill under s 126 of the LPA; and, that no agreement in writing had been entered into between the plaintiff and the defendant for a gross sum fee or for costing contentious business under s 116 of the LPA respecting the amount and manner of payment.

[48] Bearing in mind that in such cases the onus is cast on an alleged creditor to prove that the company is indebted to him, the defendant company in the current case has to show that there is an acknowledgement or admission of the 'sum' demanded in the s 218(2)(a) notice or to make out a cogent case that the said debt is clearly due and owing to them. I shall now embark on a forensic analysis of contemporaneous documents and the LPA to determine whether the sum demanded in the s 218 notice has been admitted or, is clearly not bona fide disputed by the plaintiff company or presumed by virtue of certain provisions in the LPA to be due and owing to the defendant. If the alleged debt is not sufficiently made out, then it is not a 'creditor' envisaged in s 218(2)(a) and its threat to wind-up the company is an abuse of the process of the court, because its real purpose is not to wind-up the company but to secure payment of the disputed debt without recourse to the common law court.

[49] Considering that the plaintiff's dispute on the gross bill was not seriously challenged by the defendant, the crux of the issue to be determined here is whether the alleged fees of RM11,425.51 had become due and owing by the plaintiff to the defendant by virtue of any presumption in the LPA. Itis quite obvious that the defendant had grounded his s 218(2)(a) notice upon

the contention that, as the gross sum bill for RM11,425.51 had been delivered to the plaintiff on 27 November 2001 and the plaintiff had failed, as a party chargeable, to avail itself of the provision in s 126(1) of the LPA to petition for an order for taxation of the bill within the six months period stipulated therein — and as a fortiori by the same provision he himself is also precluded from petitioning for such taxation after the lapse of one month from the date of delivery — the said sum stated in the bill became a debt due and payable to him as a clear debt. This issue was however not at all crafted by counsel in such language, A careful study of ss 121, 124, 126 and 128 of the LPA would determine how valid in law is this contention, and it is appropriate to set out the three provisions. Section 121 states:

> 121(1) Where the remuneration of an advocate and solicitor in respect of contentious business done by him is not the subject of an agreement made pursuant to s 116, the solicitor's bill of costs may at the option of the advocate and solicitor either contain detailed items or be for a gross sum:
>
> Provided that:
>
> (a) at any time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable therewith may require the advocate and solicitor to deliver to him in lieu of the cost a bill containing detailed items, and the gross sum bill shall thereupon be of no effect.
>
> (b) where an action is commenced on a gross sum bill, the court shall, if so requested by the party chargeable therewith before the expiration of one month from the service on that party of the writ or other originating process, order that the bill shall be taxed;
>
> (c) if a gross sum bill is referred to taxation, whether under this section or otherwise, nothing in this section shall prejudice any rules of court with respect to taxation and the advocate and solicitor shall furnish the taxing officer with such details of any of the costs covered by the bill as the taxing officer may require.

[50] Section 124 reads:

> 124 No advocate and solicitor to sue for costs until delivery of bill of costs.
>
> (1) Except as authorised by this Act, no advocate and solicitor shall without the leave of the court commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith, or sent by post to, or left with him at, his office or place of business, dwelling house or last known place of abode, a bill of costs, which bill shall be signed either by the advocate and solicitor, or in the case of a partnership, by any of the partners, either with his own name or with the name or style of the partnership, or by another advocate and solicitor employed

by the first-named advocate and solicitor or the partnership, or be enclosed in or accompanied by a letter, signed in the like manner, referring to the bill.

(2) Where a bill is proved to have been delivered in compliance with s(1) it *shall not be necessary in the first instance* for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown *to be a bill bona fide complying with this Act*.

[51] Section 126 provides that:

126(1) An order for the taxation of a bill or costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from the delivery.

(2) The order shall contain such directions and conditions as the court thinks proper, and any party aggrieved by any order of court may apply by summons in chambers that the same may be amended or varied or set aside.

[52] Section 128 provides:

128(1) After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the court.

(2) No such order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs.

[53] This is how I would construe the above provisions in the LPA. Asolicitor may deliver a bill of costs which shall be signed by either the advocate or solicitor, or in the case of a partnership, by any of the partners. The bill of costs may, at the option of the advocate and solicitor, either contain detailed items or be for a gross sum. A party chargeable on a gross sum bill may, before the expiration of three months from the date of delivery of such bill and before service upon him of a writ for recovery of costs require the solicitor to deliver a bill containing detailed items. When an action is commenced on a gross sum bill the court shall, if so requested by the party chargeable within one month from service of the writ or other originating process, order that the bill shall be taxed, and such details of any of the costs covered by the bill shall be furnished to the taxing officer as he may require. No advocate or solicitor shall without leave of the court commence or maintain any action for work done by him until the expiration of one month after he has delivered to the party chargeable a bill of costs. Where a bill of costs has been delivered, either party may obtain (by a petition as a matter of course) a court order for taxation of the costs. The party chargeable may petition for such order within six months from delivery of the bill, whereas

an advocate and solicitor may so petition after the expiration of one calendar month, but within one year, from the delivery. Thus, s 128 provides that after the expiration of six months from the delivery of the bill of costs no order shall be made for taxation of the solicitor's bill except upon notice to the advocate and solicitor and upon the court being satisfied that there are special circumstances. And, no order for taxation shall in any event be made after the expiration of one year from the delivery of the bill of costs at the instance of either the party chargeable or the solicitor.

[54] It is my conclusion, upon careful reading of the above provisions that, after the lapse of one year from the date of delivery of his bill, the solicitor may only sue for services rendered in a normal common law action, as he is precluded under s 128(2) from petitioning for an order for taxation. Most pertinent to the issue at hand, I would hold that there is no deeming provision in the LPA, by virtue of which this court could hold that if the party chargeable fails to petition for an order for taxation within one year from the delivery to him of the bill of costs the amount stated in the bill would ipso facto be converted into a debt due and payable to the advocate and solicitor. The only presumption that appears in any of the above provisions is in s124(2), where if a bill is proved to have been delivered, 'it shall be presumed until the contrary is shown to be a bill bona fide complying with this Act', and that 'it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill'. In my opinion, as this particular provision is couched with the words 'in the first instance' in conjunction with the words 'to be a bill bona fide complying with this Act', it ought to be construed as a provision merely designed to enable the solicitor to apply for an order for taxation after the expiration of one calendar month but within one year from the delivery of the bill; as he is then presumed to have complied with s 124(1) of the LPA. Clearly, there is no presumption that the amount in the bill thereby becomes due and owing. Consequently, as the said sum of RM11,425.51 in the bill is not presumed to be due from the plaintiff to the defendant, and a fortiori, the said bill itself (delivered on 27 November 2001) has been at all material times vigorously resisted by the plaintiff, I would hold that the issuance of the s 218(2)(a) notice was unwarranted and without justification.

[55] Thus, it would appear to me that by issuing the statutory notice the defendant had intended to avoid having to file an action in a common law court for recovery of his charges for professional services rendered (which is a proper course open to him), as his right to obtain an order for taxation of his bill of costs within the stipulated one year period of the bill had lapsed by virtue of the provisions of s 126(1) read with s 128 of the LPA; and it could be viewed as an attempt to circumvent such provisions.

[56] The courts have to be mindful of the fact that a winding up petition is a serious matter that affects the reputation and the business affairs of a company. I agree with the plaintiffs submission that the s 218 notice issued by the

defendant is an abuse of the process of court and a tactical ploy to bring unwarranted pressure to bear on the plaintiff to settle the vigorously and cogently disputed debt. I am entirely at idem with Meggary J in *Re Lympe Investments* [1972] 2 All ER 383 who had stated in no uncertain terms that the Companies Court must not be used as a debt collecting agency, nor as a means or bringing improper pressure to bear on a company.

[57] Consequently, I am abundantly satisfied that clearly, there is *bona fide* and substantial dispute, indeed, on the whole of the defendant's alleged claim and the defendant have failed to establish a debtor-creditor relationship between the plaintiff and the defendant. Hence, no question arises as to the plaintiff being 'unable to pay' or 'neglected to pay the sum' within the meaning and purport of s 218(2) of the Act. Besides all the above reasons, after having also studied the plaintiffs 'exh TKK–9', I am entirely satisfied that the plaintiff is a solvent company. The injunction as prayed by the plaintiff must be and is allowed with costs and defendant's application in encl 7 is dismissed with costs.

Plaintiff's application for injunction allowed. Defendant's application dismissed with costs.

Reported by Loo Lai Mee